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COMMISSION ON HUMAN RIGHTS
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Agenda item 10 (a)

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Working Group on Detention

Chairman: Mr. Volodymyr Boutkevitch

Rapporteur: Ms. Linda Chavez

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Introduction

1. In its resolution 7 (XXVII) of 20 August 1974, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to review every year the situation concerning the rights of persons subjected to any form of detention or imprisonment. At its forty-fifth session, the Sub-Commission decided to continue the practice of establishing a sessional working group on detention. The existing regional groups within the Sub-Commission nominated the following experts as members of the Working Group, and they were duly appointed on 4 August 1993: Mr. Volodymyr Boutkevitch (Eastern Europe), Mr. Leandro Despouy (Latin America), Mr. El Hadji Guissé (Africa), Ms. Linda Chavez (Western European and Other States) and Mr. Rajindar Sachar (Asia). In the absence of Mr. Leandro Despouy the Latin American Group designated Mr. Miguel Alfonso Martínez to be its representative at this session.

2. The Working Group met on 5, 9 and 16 August 1993. The report of the Working Group was adopted unanimously at its 3rd meeting on 16 August 1993.

3. The session was opened by the Chairman of the 1992 session of the Working Group, Mr. El Hadji Guissé. He explained the procedure of election of officers and invited the members of the Working Group to elect them. At the proposal of Mr. Alfonso Martínez, supported by Mr. Sachar, the Working Group elected Mr. Volodymyr Boutkevitch Chairman and Ms. Linda Chavez Rapporteur of its 1993 session.

4. Also at the 1st meeting, a statement was made on behalf of the Assistant-Secretary-General for Human Rights by his representative.

5. The following members of the Sub-Commission, who are not members of the Working Group, also took part in the discussion: Mr. Joinet (2nd meeting) and Ms. Palley (1st meeting).

6. The observer for Colombia also addressed the Working Group (1st meeting).

7. Statements were made by representatives of the following non-governmental organizations in consultative status with the Economic and Social Council: Amnesty International (1st meeting) and International Movement against All Forms of Discrimination and Racism (2nd meeting).

8. Ms. Claire Palley, member of the Sub-Commission, introduced her outline of the possible utility, scope and structure of a special study which might be undertaken on the issue of privatization of prisons (E/CN.4/Sub.2/1993/21), prepared pursuant to Sub-Commission decision 1992/107 and Commission on Human Rights decision 1993/108.

9. The Working Group had before it the following documents submitted under item 10 of the agenda of the Sub-Commission and relating to the provisional agenda of the Working Group:

> Note by the Secretary-General concerning the submission of information pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974 (E/CN.4/Sub.2/1993/19);

Application of international standards concerning the human rights of detained juveniles: note by the Secretary-General submitted pursuant to Sub-Commission resolution 1991/63 (E/CN.4/Sub.2/1992/20/Add.1);

Application of international standards concerning the human rights of detained juveniles: report prepared by Mrs. Mary Concepción Bautista, Special Rapporteur, pursuant to Sub-Commission resolution 1991/16 (E/CN.4/Sub.2/1992/20);

The right to a fair trial: current recognition and measures necessary for its strengthening: third report prepared by Mr. Stanislav Chernichenko and Mr. William Treat. Addendum: Right to amparo, habeas corpus and similar procedures (E/CN.4/Sub.2/1992/24/Add.3);

The possible utility, scope and structure of a special study on the issue of privatization of prisons. Outline prepared by Mrs. Claire Palley pursuant to Sub-Commission decision 1992/107 and Commission on Human Rights decision 1993/108 (E/CN.4/Sub.2/1993/21).

10. The Working Group also had before it the following documents:

Provisional agenda (E/CN.4/Sub.2/1993/WG.1/L.1);

Commission on Human Rights resolutions 1993/32 of 5 March 1993, entitled "The administration of justice and human rights", and 1993/41 of 5 March 1993, entitled "Human rights in the administration of justice"; and decision 1993/106 of 5 March 1993, entitled "Right to a fair trial";

Report of the Working Group on Detention on its 1992 session (E/CN.4/Sub.2/1992/22);

Note prepared by the Secretariat concerning coordination between the programme of human rights in the administration of justice and the programme of crime prevention and criminal justice (E/CN.4/Sub.2/1993/WG.1/CRP.1);

The death penalty. List of abolitionist and retentionist countries (June 1993). Paper submitted by Amnesty International (E/CN.4/Sub.2/1993/WG.1/CRP.2).

Adoption of the agenda

11. At its 1st meeting, the Working Group considered the provisional agenda contained in document E/CN.4/Sub.2/1993/WG.1/L.1. Following the suggestions of the Chairman, which were based on informal consultations with other members of the Working Group, the Working Group decided to adopt the following agenda:

1. Annual review of developments concerning the human rights of persons subjected to any form of detention or imprisonment.*

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* The Working Group decided to consider this item in compliance with the request contained in Commission on Human Rights resolution 1993/41.

2. Habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial.

3. The death penalty, with special reference to its imposition on persons of less than 18 years of age.

4. Juvenile justice.

5. Privatization of prisons.

6. Analysis of the work of the Sub-Commission and of the Commission on Crime Prevention and Criminal Justice, with a view to improving coordination.

7. Provisional agenda for the next session.

8. Adoption of the report of the Working Group to the Sub-Commission.

I. ANNUAL REVIEW OF DEVELOPMENTS CONCERNING THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

12. In response to the request made by the Commission on Human Rights in paragraph 7 of its resolution 1993/41 of 5 March 1993, the Working Group discussed the utility of the synopses of material provided by Governments, specialized agencies and non-governmental organizations in accordance with Sub-Commission resolution 7 (XXVII) of 20 August 1974.

13. The representative of the Assistant-Secretary-General for Human Rights drew the attention of the Working Group to the note by the Secretary-General (E/CN.4/Sub.2/1993/19) concerning this question. He pointed out that no replies had been received during the previous two years to the requests for relevant information. He recalled that the Working Group on Detention, at its previous session in August 1992, had discussed once more the question of the synopses of material provided by Governments, specialized agencies and non-governmental organizations in accordance with Sub-Commission resolution 7 (XXVII). The Group emphasized that, in the absence of new information, the synopsis was useless.

14. In that connection, and in response to the request made by the Commission on Human Rights in paragraph 7 of its resolution 1992/31 of 28 February 1992, the Working Group proposed that the Sub-Commission should suspend consideration of this item. The Sub-Commission took no action on this proposal in 1992 and therefore the Commission had reiterated its request to the Sub-Commission to formulate concrete proposals in that regard.

15. Mr. Joinet proposed that the so-called "synopsis" document hitherto submitted under resolution 7 (XXVII) be suspended in the absence of any information from the usual sources, particularly the non-governmental organizations. Moreover, the question of a document on violation practices had already been dealt with by the Sub-Commission in the context of its consideration of methods of work, particularly in connection with item 6 of its agenda.

16. Mr. Boutkevitch noted that the procedure established pursuant to resolution 7 (XXVII) had been conducive to establishing new relevant mechanisms and procedures. Those new mechanisms and procedures in particular thematic procedures, replace and extend the procedure provided for by Sub-Commission resolution 7 (XXVII). Given those developments he supported Mr. Joinet's recommendation to suspend consideration of information pursuant to that resolution.

17. Consequently, the Working Group decided to recommend to the Sub-Commission not to continue issuing the report of the Secretary-General and the synopsis of materials pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974.

II. HABEAS CORPUS AS A NON-DEROGABLE RIGHT AND AS ONE OF THE REQUIREMENTS FOR THE RIGHT TO A FAIR TRIAL

18. Mr. El Hadji Guissé stated that the primary purpose of habeas corpus as an independent remedy was to protect the personal freedom of detainees. He pointed out that that principle constituted a fundamental guarantee of the application of all standards relating to detained or imprisoned persons. In his view, those persons had the right to be visited by members of their families and were entitled to have the assistance of a legal counsel, including that assigned to them by a judicial or other authority without payment by them if they did not have sufficient means to pay. It was also indispensable that medical care and treatment be provided for them whenever necessary. He gave examples of the application of those rights in Senegal and proposed that their application in other regions should be studied.

19. That proposal was upheld by Mr. Boutkevitch and Mr. Sachar, who emphasized the importance of a study of the application of habeas corpus in Asian and Eastern European countries so that the experience of those regions could be taken into account and the achievements and shortcomings in the application of habeas corpus elucidated.

20. Ms. Palley and Mr. Sachar stated that it was not sufficient that that right be provided for by the Constitution or by law or that it be formally recognized. In their view, it must be truly effective in providing redress.

21. Mr. Alfonso Martínez pointed out that the provisions of the International Covenant on Civil and Political Rights having to do with the right to habeas corpus were not limited to those in article 14 of that Covenant. Article 9, paragraph 4 of the Covenant was also very relevant to that right. None of those provisions were expressly mentioned as non-derogable under article 4, paragraph 2, of the Covenant. Given the importance of such provisions, they should not be derogable. He stressed the importance of the analysis and especially the recommendations made by the Special Rapporteurs on the right to a fair trial, Mr. Chernichenko and Mr. Treat in their most recent report (E/CN.4/Sub.2/1992/24/Add.3).

22. The members of the Working Group and other participants were of the opinion that the guarantees provided by habeas corpus should be incorporated into every country's national legislation as a non-derogable right. They also shared the view that States should maintain the right to habeas corpus at all times and under all circumstances, even in a state of emergency.

23. Mr. Joinet proposed that the elaboration of a draft declaration on habeas corpus should be considered at one of the next sessions of the Working Group. This suggestion was supported by the International Movement against All Forms of Discrimination and Racism.

24. Mr. Alfonso Martínez expressed the opinion that the question of the elaboration of standards concerning habeas corpus might be considered by the Commission on Crime Prevention and Criminal Justice. He added that some proposals in that regard submitted by the Special Rapporteurs on the right to a fair trial might be helpful in considering future standards in that field.

25. Mr. Joinet expressed the view that work undertaken by the Sub-Commission should be completed at Geneva, particularly with regard to habeas corpus. He also thought that the draft protocol recommended by Mr. Chernichenko and Mr. Treat should be preceded, for the sake of effectiveness, by a declaration, in accordance with the usual United Nations practice.

26. In this connection the Working Group decided to postpone the examination of the issue until its next session pending consideration by the Sub-Commission of the above-mentioned report of the Special Rapporteurs and proposals made by them.

III. THE DEATH PENALTY, WITH SPECIAL REFERENCE TO ITS IMPOSITION ON PERSONS OF LESS THAN 18 YEARS OF AGE

27. Ms. Palley thought that the list prepared by Amnesty International (E/CN.4/Sub.2/1993/WG.1/CRP.2) was useful but not exhaustive. For example, it did not include the States which had adopted laws applying the death penalty to new offences or had extended the laws to past offences.

28. Thus Pakistan, for example, a country which did not appear on the list, had recently introduced the death penalty for blasphemy and heresy. She asked the Working Group to adopt a position with regard to the responsibility of States which tolerated the machinations of religious jurists, such as the issuing of Fatwas. The case of Iran was quoted as an instance.

29. Mr. Guissé, basing himself on the report on the death penalty prepared two years previously by Mr. Joinet and himself, demonstrated that it had not been possible to give an accurate representation of the evolution of the death penalty in the world, inasmuch as the evolution in question was saw-toothed, depending on every political change. For example, Gambia and Guinea-Bissau had, in 1993, entered the category of States that had abolished the death penalty for all offences.

30. Mr. Alfonso Martínez said he regretted that the category of retentionist countries and territories in the list prepared by Amnesty International gave no indication of the States which did not apply the death penalty to persons under 18 years of age; he recommended that such a distinction be made. He also thought that the cases of the mentally sick also constituted a factor in the abolition of the death penalty. Lastly, he emphasized the need of adopting the recommendations made by the Working Group at its 1992 session and contained in paragraph 27 of document E/CN.4/Sub.2/1992/22.

31. Mr. Guissé recognized the relevance of those comments while recalling that the terms of reference for the year in question had been limited to the distinction between abolitionist and retentionist countries. He proposed that future studies should reflect developments in the death penalty with particular regard to minors, elderly persons, pregnant women and other categories of vulnerable groups.

32. Amnesty International took note of the constructive comments by Ms. Palley and illustrated them by the case of Peru whose Constituent Assembly had, two days previously, re-established the death penalty for certain crimes. It drew attention to the recent trend in Africa towards complete abolition of the death penalty (Angola, Gambia and Guinea-Bissau for example). However, it expressed its concern with regard to the continued execution of minors, particularly in the United States but also in countries such as Bangladesh, Iran, Iraq, Nigeria and Pakistan. It recommended that the Working Group should undertake a study, possibly in collaboration with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteurs on the right to a fair trial and the United Nations Vienna-based Crime Prevention and Criminal Justice Branch on the manner in which States had applied, through their laws and their practices, some of the recommendations of the Economic and Social Council contained in its resolution 1989/64. It also proposed a recommendation to the Sub-Commission that it should work for the re-establishment of the quinquennial report on capital punishment by the Crime Prevention and Criminal Justice Branch that had been suspended in 1992 after the first session of the Commission on Crime Prevention. Moreover, it suggested the inclusion in that report of information on the laws and treaties relating to extradition in cases involving capital punishment.

33. The Working Group recommended that that agenda item should be considered in terms of the following formulation:

> Issues related to the deprivation of the right to life, with special reference to:
>
> (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;
>
> (b) Questions relating to summary, arbitrary and extrajudicial executions.

IV. JUVENILE JUSTICE

34. Mr. Alfonso Martínez drew the attention of the Working Group to some essential points: minimum age of criminal liability, duration of pre-trial detention, minimum recourse to institutionalization, treatment by institutions and separation of juvenile detainees from adult criminals in prison establishments.

35. He also drew attention to the proposal by the Secretary-General in his note (E/CN.4/Sub.2/1992/20/Add.1) on the organization of a meeting of experts, under the auspices of the Centre for Human Rights, on the application of international standards concerning the human rights of detained juveniles. That meeting of experts could also draw up a balance sheet of juvenile delinquency in the world.

36. Being questioned as to the way in which that proposal was to be put into practice, the Secretariat drew the Working Group's attention to resolution 1993/80 of the Commission on Human Rights entitled "Application of international standards concerning the human rights of detained juveniles". In operative paragraph 3 of that resolution, the Commission on Human Rights "Welcomes the proposal by the Secretary-General ... to organize, within the framework of the programme of human rights activities for 1994, a meeting of experts under the auspices of the Centre for Human Rights, the United Nations Children's Fund and the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs on the application of international standards concerning the human rights of detained juveniles".

37. Mr. Guissé emphasized the need to work out a specific regime for juveniles taking their weaknesses into account. He gave the example of Senegal, a country which had developed specific prevention, education and assistance legislation for juveniles at risk and in conflict with the law.

38. The Working Group decided to recommend that the Sub-Commission should urge States to make greater efforts to apply the principle of separation of adults and juveniles in prison establishments.

V. PRIVATIZATION OF PRISONS

39. Ms. Palley pointed out that there had been private sector involvement in a wide range of penal functions, facilities, services and activities. Those activities ranged from financial contributions for building prisons, to total management and operation of entire prisons and also included use of prisoner labour by private bodies. Private sector involvement might affect penal policy, punishment and human rights. In addition, the possibility of privatization raised questions as to the sources of State power to act coercively and to impose limitations on human rights; there was also the question of what safeguards were necessary if prison privatization was permissible. She outlined the five main policy arguments against prison privatization:

(i) It must be solely for the State to discipline prisoners, possibly prolonging their imprisonment;

(ii) It must be solely for the State, not private persons to use force to restrain prisoners;

(iii) The State must be liable for violations of prisoners' rights while in custody;

(iv) The State must remain accountable and visible in its actions vis à vis prisoners;

(v) The State must be the sole entity with power to administrate justice and to execute it by coercion: only the State had legitimacy in the eyes of the people, because it was the State which the people had entrusted with jurisdiction and powers of coercion to force prisoners to obey the law, and not private persons, whom the people had not entrusted with power.

40. Further, Ms. Palley outlined the major legal and theoretical issues in relation to state power over subjects and state duties towards them. Those issues involved difficult questions of State responsibility and the developing scope of international human rights law in the light of the general principles of law among States. She said that she had tried to identify standards and safeguards that would be necessary if there were to be private sector involvement in the operation of prisons. She concluded by suggesting the need for further study, in particular on the necessary additional safeguards to protect human rights in cases of prison privatization.

41. Mr. Alfonso Martínez was also in favour of a study on minimum guarantees for prisoners and the responsibilities of the State in the event of privatization.

42. Mr. Sacher expressed his interest in the study on privatization, a phenomenon which was unknown in India. He emphasized the dangers of privatization with regard to fundamental rights, since it involved transferring the power of the State to private persons.

43. Mr. Guissé expressed his anxiety concerning the privatization of prisons, a very sensitive sector which, on the one hand, had always been managed by the State and, on the other, was a place of deprivation of freedom. Management of a prison according to the rules of the private sector, and thus with a concern for gain, could well be the source of serious abuse, such as the organization of forced labour, a particular form of slavery. He emphasized the need for clear regulations and careful thought on the subject of privatization.

44. The observer for Colombia said that most States were in no position to ensure the management of prisons and to abide by the Standard Minimum Rules for the Treatment of Prisoners because of their lack of resources and the costs of the services. The modern State was thus inclined to diversify its activities by seeking new ways of carrying out its functions without losing its authority or control of its responsibilities. He proposed that the question of privatization should be studied particularly in terms of prison logistics and social rehabilitation, with due regard for both its positive aspects and its dangers.

45. The Working Group, having completed its study of that agenda item, recommended that the Sub-Commission should recommend to the Commission on Human Rights that Ms. Palley be requested to carry out a further special study of the topic.

VI. ANALYSIS OF THE WORK OF THE SUB-COMMISSION AND OF THE THE COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE, WITH A VIEW TO IMPROVING COORDINATION

46. The secretariat drew the attention of members of the Working Group to some new developments with respect to coordination. For example, in collaboration with the Crime Prevention and Criminal Justice Branch at Vienna, the Centre for Human Rights had organized a number of training courses for law enforcement officials which had provided an opportunity to test a jointly elaborated and specifically designed programme on a large, representative sample of law enforcement officials.

47. In the view of the secretariat, the Commission on Human Rights and the Sub-Commission should continue to coordinate their work, in particular the Special Rapporteurs' efforts, with the activities of the Commission on Crime Prevention and Criminal Justice and with the periodic United Nations Congresses on the Prevention of Crime and Treatment of Offenders. At the same time, the Special Rapporteurs on torture, on arbitrary executions, on the right to a fair trial and on impunity, as well as the respective officers of the Centre, should also work closely with the relevant mechanisms and institutes of the United Nations crime prevention and criminal justice programme.

48. Coordination of such activities should be further encouraged and properly financed, as recommended to the Secretary-General by the World Conference on Human Rights. It had also recommended that high-level officials of relevant United Nations bodies and specialized agencies at their annual meetings, besides coordinating their activities, also assess the impact of their strategies and policies on the enjoyment of all human rights.

49. Given that recommendation of the World Conference, it seemed desirable and appropriate to include in the agenda of the annual meetings of relevant United Nations bodies and specialized agencies an item concerning coordination between the programme of human rights in the administration of justice and the programme of crime prevention and criminal justice.

50. Mr. Alfonso Martínez stressed the necessity of coordination between the Centre for Human Rights and the Crime Prevention and Criminal Justice Branch, to avoid duplication and to undertake concerted action especially in the field of advisory services and technical assistance, for example the organization of seminars and training courses aimed at the prevention of crime.

51. At the proposal of Mr. Joinet and Mr. Alfonso Martínez, the Group requested the secretariat to draft a report on the subject for consideration by the Working Group and by the Sub-Commission at their next sessions.

VII. OTHER MATTERS

52. At the proposal of Mr. Joinet, the Working Group decided to consider at its next session follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

VIII. PROVISIONAL AGENDA FOR THE NEXT SESSION

53. At its 2nd meeting, the Working Group adopted the following provisional agenda for its next session:

1. Election of a chairman and a rapporteur.

2. Adoption of the agenda.

3 Habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial.

4. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Questions relating to summary, arbitrary and extrajudicial executions.

5. Juvenile justice.

6. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

7. Analysis of the work of the Sub-Commission and of the Commission on Crime Prevention and Criminal Justice, with a view to improving coordination.

8. Provisional agenda for the next session.

9. Adoption of the report of the Working Group to the Sub-Commission.

IX. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

54. The report of the Working Group was adopted at its 3rd meeting on 16 August 1993.